Chian a/p Endin Tin v Public Prosecutor and another application

HIGH COURT (PULAU PINANG) — CRIMINAL APPLICATIONS NO 42–150 OF 2002 AND 42–170 OF 2002
KAMALANATHAN RATNAM J
12 FEBRUARY 2004

Criminal Procedure — Sentencing — Mitigating factors — Appeal against conviction and sentence — Both accused first offenders and expressed remorse — First accused acted on provocation of complainant against second accused — Whether court should take into account mitigating factors

The first and second accused (mother and son) were charged for an offence of assault under s 326 of the Penal Code and found guilty and sentenced to four years' imprisonment. It was alleged by the accused persons that the complainant showed a masturbating sign to the second accused and used vulgar words on the second accused thus causing the confrontation. The first accused then 19 years old had used fouled language to the complainant and both accused had attacked him with iron rods. This was an appeal by both accused against conviction and sentence.

Held, dismissing the appeal against conviction but allowing the appeal against sentence:

(1) It was the complainant who initiated the quarrel. In considering sentence, the judge took into account that at the time of the offence the first accused was 19 years old. Anyone for that matter would be protective of one's mother, the symbol of love, affection and care. Now, he was married and the sole breadwinner for his family. He had no previous convictions and had expressed remorse. Justice would be best served by not imprisoning him for a long time but by giving him another chance. Therefore, the court sentenced him to a day's imprisonment and fined him RM2,500 and in default, one month's imprisonment (see paras 14–16).

(2) As for the second appellant, a long term of imprisonment for an old woman would be harsh. She was also a first offender with no other previous convictions. She was remorseful and had apologized to the court. Justice would be met by imposing a reasonably heavy fine that she could pay but with difficulty. Therefore, the term of imprisonment of four years was set aside and the second accused was sentenced to a day's imprisonment and fined RM2,500 and in default, one month in prison (see paras 17–18).

[Bahasa Malaysia summary

Tertuduh pertama dan kedua (ibu dan anak lelaki) telah dituduh kerana kesalahan serangan di bawah s 326 Kanun Keseksaan dan didapati bersalah dan dijatuhkan hukuman empat tahun penjara. Ia telah dikatakan oleh kedua-dua tertuduh bahawa pengadu telah menunjukkan tanda kurang sopan kepada

tertuduh kedua dan menggunakan perkataan-perkataan kurang sopan sehingga menyebabkan konfrantasi. Tertuduh pertama telah menggunakan bahasa kesat kepada pengadu dan kedua-dua tertuduh telah menyerang beliau dengan batang besi. Ini adalah rayuan oleh kedua-dua tertuduh terhadap sabitan dan hukuman.

Diputuskan, menolak rayuan terhadap sabitan tetapi membenarkan rayuan terhadap hukuman:

(1) Ia adalah pengadu yang memulakan pertelingkahan. Dalam menimbangkan hukuman, hakim telah mengambilkira pada masa kesalahan tersebut tertuduh pertama adalah 19 tahun. Sesiapapun akan melindungi ibunya, tanda kasih saying dan bersifat pelindung. Sekarang, beliau telah berkahwin dan merupakan penyara tunggal keluarga. Beliau tiada sabitan lampau dan telah menunjukkan rasa kesal. Keadilan lebih berkesan dilaksanakan dengan tidak memenjarakan beliau untuk tempoh panjang tetapi dengan memberikan beliau satu lagi peluang. Oleh itu, mahkamah telah menjatuhkan hukuman satu hari penjara dan mendenda beliau sebanyak RM2,500 dan jika gagal, satu bulan penjara (lihat perenggan-perenggan 14–16).

(2) Berhubung tertuduh kedua, satu tempoh penjara untuk seorang wanita tua adalah kejam. Beliau juga seorang pesalah pertama tanpa sabitan lampau lain. Beliau menyesal dan telah memohon maaf kepada mahkamah. Keadilan akan terlaksana dengan mengenakan denda berat yang munasabah beliau boleh bayar tanpa masalah. Oleh itu, tempoh penjara empat tahun telah diketepikan dan tertuduh kedua dihukum sehari penjara dan denda RM2,500 dan jika gagal, satu bukan penjara (lihat perenggan-perenggan 17–18).]

Notes

For cases on mitigating factors, see 5 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 3273–3295.
For sentencing, see *Halsbury's Laws of Malaysia* paras [310.469]–[310.506].

Legislation referred to

Criminal Procedure Code s 294
Penal Code s 326

MK Ganeson (J Gurunam Singh & Co) for the first applicant.
V Amareson (J Gurunam Singh & Co) for the second applicant.
Tuan Hamdan bin Hamzah (Deputy Public Prosecutor) for the prosecution.

Kamalanathan Ratnam J:

[1] This is a case where both the first and second accused (mother and son) were charged for an offence under s 326 of the Penal Code and found guilty and sentenced to four years in prison. Both accused appealed against conviction and sentence. After hearing lengthy submissions from both parties, I dismissed

the appeal against conviction but allowed the appeal against sentence. Isentenced both accused to a day's imprisonment and imposed a fine of RM2,500 each in default one month's imprisonment. The public prosecutor has appealed against my decision on sentence.

Findings of the court

[2] As the saying goes, justice must be tempered with mercy. It does not mean that once a court finds a person guilty of the offence charged the court must extract retribution. The court must impose such punishment as would make the perpetrator regret his/her action.

[3] In this case, there is no doubt in my mind that there had been grave provocation by the complainant (SP2). It is in evidence that both the accused and the complainant had stalls near each other at the Botanical Gardens, Pulau Pinang.

[4] The complainant's version as to how he came to be assaulted, would suggest that he is a victim of a pre-planned assault. He testified that he knew both the accused for about 20 years. On the eventful day, he was riding his bicycle on his way home from work at the Botanical Gardens and holding an umbrella with the other hand as it was drizzling. Suddenly, the first accused appeared before him and blocked his path and at the same time the first accused's mother, the second accused, who also appeared at the scene, started abusing him. The first accused used foul language on him. Then both attacked him with iron rods. He had no time even to ask them why he was being assaulted.

[5] On the other hand, both the accused put their version to the complainant. It was the case of the accused that the complainant showed a masturbating sign to the second accused and used vulgar words on her thus causing the confrontation.

[6] Having heard the submissions of both parties, I dismissed the appellant's appeal against conviction but allowed their appeal against sentence.

[7] Having convicted both the appellants, the learned sessions court judge sentenced both mother and son to four years in prison.

[8] Whilst the assault on the complainant was clearly excessive, I am satisfied that there was grave provocation by the complainant. I do not believe his story that for no rhyme or reason the two accused would stop him in the middle of the road and assault him. This feud between the complainant and the two accused had been brewing and simmering for a long time.

[9] What the complainant did was also improper. He showed a masturbating sign to an old woman and in the presence of her son. The wife of the first appellant also testified, corroborating the version of both the appellants. However, the learned sessions court judge said that she did not give much weight to her evidence. When this witness was seen sitting in court, the learned sessions court judge had asked counsel for both the appellants if the wife would be called as a witness. The answer was in the negative. Subsequently, counsel decided to call her as a witness.

[10] I do not see anything wrong in this witness being called to testify although counsel had earlier indicated they were not calling her. It is possible that evidence led by the parties necessitated calling the wife. What the learned sessions court judge ought to have done was to have explained which aspect of the wife's evidence she was not giving due weight to because of the fact that this witness was seated in court.

[11] In this case, all that the judge did was to say that because she was seated in court she was not giving much weight to her evidence. The general rejection of her evidence is unacceptable.

[12] Her evidence corroborates the evidence of the two appellants in so far as to the provocation. Whilst the complainant denied making the lewd sign to the second accused he could give no cogent reason why he was confronted and assaulted on the road. His evidence that he was assaulted because he was acquitted of a criminal charge where the first accused was a complainant and that the acquittal had made both the appellants angry cannot be accepted because he was acquitted a long time ago and why would both the appellants suddenly decide to confront him and assault him that particular day.

[13] The answer is obvious. The complainant whilst riding by the appellants' stall did show the lewd sign, thus aggravating and provoking a tense situation.

[14] It was the complainant who initiated the quarrel. In considering sentence, I took into account that at the time of the offence the first accused was 19 years old. I accept the fact that to a youngster of that age, any abuse of his mother would be the proverbial match-stick to light up the fuse. Anyone for that matter would be protective of one's mother, the symbol of love, affection and care. However violent a person is, he will mellow in the presence of his mother. On that day, seeing the complainant perform such a lewd masturbating sign towards his mother, it must have set the already hot-blood of a 19 years old to boil.

[15] When he appeared before me, he was already married with two children, the eldest being five years old and the youngest, two months old. He is the sole breadwinner for his family and he is gainfully employed as a delivery boy in a furniture factory earning RM900 per month. He has no previous convictions and has expressed remorse.

[16] Looking into his antecedents, justice would be best served by not imprisoning him for a long time but by giving him another chance. His conduct is not reflective of a seasoned criminal to warrant a four-year imprisonment. However, I rejected his counsel's plea to bind him over under s 294 of the Criminal Procedure Code. Although such a binding over would see a conviction recorded, yet I am of the view that such a binding over order would not reflect the gravity of the conviction. What would hurt and cause reflection upon someone with a low income is in my view an imposition of a reasonably heavy fine as he would have to dig deep into his pocket to pay the fine or face the in default imprisonment. Taking all factors into consideration, I was of the view that justice would best be served in this case if I sentenced him to a day's imprisonment and fined him RM2,500 and in default, one month's imprisonment.

[17] As for the second appellant, she is 54 years old and a widow with an elderly mother to take care. She is also a first offender with no other previous convictions. She was herself subjected to verbal and lewd abuse. She ekes out a modest income by selling chapatis to visitors at the Botanical Gardens. She is remorseful and has apologized to the court. Ever since the incident, she has been under stress and not in good health.

[18] I would apply the same consideration that I meted out to the first appellant. A long term of imprisonment for an old woman would be harsh. Justice would be met by imposing a reasonably heavy fine that she could pay but with difficulty. I therefore set aside the term of imprisonment of four years and sentenced her to a day's imprisonment and fined her RM2,500 and in default, one month in prison.

Appellant's appeal against conviction dismissed but allowed their appeal against sentence.

Reported by Ezatul Zuria Azhari